United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1015

To be argued by
ALLEN R. BENTLEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1015

UNITED STATES OF AMERICA,
Appellant,

—v.—

ADOLPH RIVERA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF CASES

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ARGUMENT

POINT I

There was ample probable cause for Rivera's arrest.

Point A of Rivera's brief (pp. 14-21) is apparently guided by the mistaken premise that if prior to arrest no single fact known to the law enforcement officers rises to the level of probable cause, any arrest is invalid. In accordance with that premise, Rivera seeks to sustain the District Court's finding by artificially compartmentalizing the pertinent facts known to the agents prior to Rivera's arrest and then by arguing that the information possessed by agent O'Connor before Rivera's nod was insufficient and that the nod itself was too ambiguous a gesture

to warrant an arrest. The argument and analysis are wholly without merit.

While individual components of a fact pattern which has led to an arrest may be discussed separately for purposes of argument, Rivera fails to recognize that in determining probable cause the officers are entitled to draw conclusions "in the light of the particular situation and with account taken of *all* the circumstances," *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949) (emphasis added). See also *United States* v. *Tramunti*, 513 F.2d 1087, 1104 (2d Cir. 1975). Even assuming that knowing presence at the scene of a drug transfer or a nod may under some circumstances fail to provide probable cause, in this case both aspects of Rivera's conduct, together with other facts, such as Meyerson's words as Rivera and Glenn entered the restaurant,* cast light on each other and gave O'Connor a firm and well-warranted belief that Rivera was involved in the commission of an offense.

Moreover, Rivera is on far from steady ground in his contention that neither knowing presence nor the nod, taken individually, constituted probable cause. Rivera's only authority for the proposition that "*knowing* presence

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* Meyerson said "my people are here" (see A-55), or "they are here," (A-63). Far from being "meaningless," as Rivera argues, Rivera Brief p. 17, the statement gave O'Connor the impression that Rivera and Glenn were associated in the business of dealing in LSD, an impression which subsequent events did nothing to dispel. Whether or not Meyerson knew that Rivera was Glenn's partner, it is the subjective belief which O'Connor reasonably formed, based on Meyerson's statement and the other pertinent facts and circumstances, which is critical to the determination of probable cause. *United States* v. *Tucker*, 380 F.2d 206, 212 (2d Cir. 1967); *United States* v. *Wilkes*, 451 F.2d 938, 939 n.2 (2d Cir. 1971).

at the scene of a crime . . . does not amount to probable cause to believe there is participation in the crime itself," Rivera Brief p. 18, (emphasis added), is *United States* v. *Di Re*, 332 U.S. 581 (1948). Di Re had been arrested on the basis of his presence in a car with one Buttina, whom a Government informant had identified as a seller of counterfeit rationing coupons. The decision makes plain that the arresting officer had no reason to believe that Di Re knew of Buttina's illegal activities:

> "An inference of participation in conspiracy does not seem to be sustained by the facts peculiar to this case. The argument that one who 'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passers-by, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration coupons, it would not follow that he would know them to be counterfeit." 332 U.S. at 593.

Di Re clearly anticipated that knowing presence at the scene of a crime—and Rivera concedes, Rivera Brief p. 18, that O'Connor could reasonably have concluded that Rivera's presence was such—might under some circumstances constitute probable cause. *Compare, e.g., United States* v. *D'Amato*, 493 F.2d 359, 363-65 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1207-08 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974). In this case, the meeting was held late at night and under conditions—including Glenn's stated desire to conduct the transaction at a less public place and O'Connor's proposal to have Rivera count the

$1800, after which the money and drugs would be passed under the table—which can only be described as "secretive" and "suspicious." Moreover, "there may even be instances where the mere presence of a defendant at the scene of a crime he knows is being committed will permit a jury to be convinced beyond a reasonable doubt that the defendant sought 'by his action to make it succeed. . . .'" *United States* v. *Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962) (Friendly, *J.*).* Since probable cause to arrest "does not require the arresting officer to know of facts sufficient to prove guilt at trial, *Draper* v. *United States*, 358 U.S. 307, 311-12 (1959)," *United States* v. *Rodriguez*, Dkt. No. 75-1287 (2d Cir. March 11, 1976), slip op. 2585, 2590, Rivera's knowing presence at Manjos with Glenn, together with the other pertinent facts, provided the agents who effected the arrest with more than ample probable cause to do so.

Similarly, Rivera's attempts to analyze away the plain import of the nod in the restaurant are unavailing. Aside from the fact that this Court in *Tramunti* was considering whether or not a nod was evidence of guilt beyond a reasonable doubt, the Court's comment that a nod by itself was insufficient to tie Tramunti to a narcotics

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* Indeed, in effecting Rivera's arrest here the agents could justifiably have concluded, wholly apart from the other evidence of Rivera's involvement, that Glenn's willingness to engage in discussions regarding the sale of LSD and actually to transfer some of that contraband in the unflinching presence of Rivera, with whom Glenn had arrived, bespoke a mutual trust and confidence on the part of Glenn and Rivera and strongly suggested a concert of action and shared purpose between them. Moreover, given all that preceded Rivera's arrest, the agents could properly have concluded that Rivera was present, in part, to aid and abet the drug offense by safeguarding the valuable LSD that his companion Glenn was carrying on his person and the $3600 Glenn expected to receive by evening's end for the drugs he had supplied on two separate occasions.

conspiracy was based on the ambiguity of the statement by Inglese to which Tramunti nodded: "I expect some goods. I am going to need some money." 513 F.2d at 1111. At that point in the Government's case, there was no proof of what Tramunti understood Inglese to mean by "goods." In this case, where the Government witness was a participant in the conversation rather than one who overheard it, see *ibid.*, where the nature of the statement to which Rivera nodded is clear, and where Rivera's subsequent conduct in watching the money being counted showed that he understood that to which he nodded his assent, the nod cannot be blinked away by any claim of ambiguity.*

Nor is the language Rivera has cited from *Wong Sun* v. *United States*, 371 U.S. 471, 484 (1963), of any bearing in this case. *Wong Sun* considered flight, which followed the failure of federal officers to identify themselves, as "ambiguous conduct which the arresting officers themselves have provoked." Although Rivera's willingness to participate in the LSD transaction was demonstrated at O'Connor's request, there was nothing ambiguous about the meaning of what he did and thus *Wong Sun* does not apply in the sense in which it was invoked by Rivera.

Rivera virtually gives up the probable cause argument, finally, in suggesting that he chose to create the "appearance" of participation rather than actively repudiating—or disassociating himself from—Glenn. Rivera Brief p. 20. Certainly agent O'Connor was entitled to act in reliance on such appearances. "The fact that some of the officers' beliefs [may be] later proved untrue

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* It is worthy of note that the subsequent conversations which the Court in *Tramunti* held to be a "plain" showing of Tramunti's tie to the narcotics organization were far more ambiguous than the conversation at Manjos which led to the arrests herein.

in no way affects the issue of probable cause. . . ." *United States* v. *Tramunti, supra*, 513 F.2d at 1104. "[A]n officer need not be able to negate all possible lawful explanations of a situation before making an arrest," *United States* v. *Rodriguez, supra*, slip op. at 2590, nor need he reach out for speculative interpretations consistent with legality when faced with facts from which a person of ordinary reason and common sense would conclude that a crime was being committed in his presence.

POINT II

Rivera's post-arrest statement was not obtained by the exploitation of an unlawful arrest.

In Point B of his brief (pp. 21-24), Rivera, for the first time in connection with the issue at bar, undertakes to compose a miscellany of horrors purportedly inflicted upon him as a result of the allegedly wilful and deliberate misconduct by Government agents. That effort, designed by Rivera to support Judge Motley's determination to suppress the post-arrest statements, serves instead only to betray the plain fact that Judge Motley herself never once considered, much less made findings of fact with respect to, the agents' purpose in effecting Rivera's arrest or the pertinent "intervening circumstances" between that arrest and Rivera's later statement. In short, Rivera's current effort signals, by its contrasting character, the fact that Judge Motley, in suppressing the statement, applied a forbidden *per se* rule to her initial finding of the arrest's illegality. For that reason alone, and wholly apart from the propriety of her initial finding, her order cannot stand. Furthermore, we respectfully submit that a review of the essentially undisputed facts contained in the record makes it clear that Rivera's post-arrest statement was not obtained by the exploitation of any primary illegality.

This Court reiterated only recently that a statement is the tainted fruit of an unlawful arrest only when it is obtained by "exploitation" of the primary illegality, *United States* v. *Luchetti*, Dkt. No. 75-1221 (2d Cir. March 4, 1976), slip op. 2351, 2370, and confirmed that, "[t]he Government 'exploits' an unlawful arrest when it obtains a conviction on the basis of the very evidence, not shown to have been otherwise procurable, which it hoped to obtain by its unconstitutional act." *Ibid.*, quoting from *United States* v. *Edmons*, 432 F.2d 577, 584 (2d Cir. 1970). Here, whatever else one might say about the allegedly unlawful arrest, it is transparently clear that it was in no sense "connected with the evidence-gathering or investigative process." *United States* v. *Luchetti*, *supra*, slip op. at 2370; *cf. Brown* v. *Illinois*, 422 U.S. 590 (1975). Since Rivera was arrested solely because the agents believed he had participated in the commission of a drug offense in their very presence, and since nothing which occurred after his arrest and prior to his statement suggests some contrary or additional purpose, the application of the exclusionary rule here is inappropriate.

Rivera's implication, Rivera Brief pp. 21-22, that the agents deliberately arrested him late at night to permit lengthy confinement and interrogation is unsupported by anything in the record. On the contrary, testimony at the December 15th hearing clearly established that Rivera was arrested because the agents believed in good faith that they had observed him committing a felony drug offense. Even were this Court to sustain the finding of the District Court that the facts known to the agents were insufficient to constitute probable cause, it is hard to imagine facts which would come any closer to satisfying that standard. Nor can it seriously be argued that the meeting at which Rivera appeared was scheduled by the agents for non-business hours in the expectation that arrests and subsequent overnight confinement would re-

sult.* It was Meyerson, who had himself been arrested earlier in the evening on April 16, 1974, A-50, who placed the phone call to Glenn and made arrangements with him for the meeting at Manjos, A-53.

It is equally clear, as Judge Motley found after the September 13th hearing, that Rivera suffered no violation of his Sixth Amendment right to counsel.** That finding was correct and is conclusive for purposes of this appeal.

In addition to the alleged denial of counsel, Rivera asserts a number of claims which he contends show impermissible exploitation of his arrest and resulting temporary confinement for the purpose of eliciting the statements he eventually made. With one exception,*** all of

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* Rivera also makes mention, Rivera Brief, p. 19 n.11, of the fact that a warrant was not obtained. Since the agents had no basis for obtaining a warrant for Rivera's arrest before the meeting at Manjos, this case was pre-eminently one in which a warrantless arrest was proper.

** The record on which Judge Motley based her decision does contain testimony from agent Bell to the effect that Rivera, when questioned at the DEA offices, stated that "maybe he shouldn't answer more questions" "until he talked to a lawyer," Tr. 17, at which point questioning was immediately halted, Tr. 18. However, on cross-examination Bell testified that Rivera had not requested a lawyer or permission to call a lawyer, Tr. 23. The tentative and equivocal nature of Rivera's references, at the DEA offices, to obtaining counsel make it fair to infer that Rivera was at that time pondering whether or not to request an attorney before any questioning. His call the following day to a friend to arrange for retained counsel provided a reasonable basis for again asking, after proper *Miranda* warnings, whether he wished to make a statement. *Cf. United States* v. *Collins*, 462 F.2d 792, 802 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972); *Michigan* v. *Mosley*, — U.S. —, 44 U.S.L.W. 4015 (Dec. 9, 1975).

*** The contention that disparaging remarks were made to Rivera at DEA Headquarters by one of the agents, resting solely on Rivera's testimony, was not passed upon by the District Court. Certainly such remarks are not to be condoned, if

[Footnote continued on following page]

the items cited by Rivera represented either lawful conduct by the agents or resulted from circumstances over which they exercised no control.

It was not improper for agent Bell to advise Rivera, before Rivera had spoken to the Assistant United States Attorney, to "cooperate". *United States* v. *Collins*, 462 F.2d 792 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972). Rivera is correct in noting that the District Court has not ruled on his claim that his arraignment was unnecessarily delayed, but it is significant that neither overnight lodging, *United States* v. *Price*, 345 F.2d 256 (2d Cir.), *cert. denied*, 382 U.S. 949 (1965), nor prearraignment questioning in the Office of the United States Attorney, *United States* v. *Ortega*, 471 F.2d 1350, 1362 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973), has been held to consttittute unnecessary delay under Rule 5, Fed. R. Crim. P.*

The other matters mentioned by Rivera in no way reflect any intentional over-reaching or attempt to force him to waive his Fifth Amendment rights. Rivera and Glenn were taken from West Street to the Tombs in an attempt to accommodate their desire to be lodged in the same place, A-14, and the agents clearly played no part in the refusal of officials at the Tombs to take them into

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they were indeed made. Yet given the lapse of time between the alleged taunts and the statements, as well as the absence of any showing that they were repeated (*see, e.g.*, Tr. 84), it is difficult to perceive any causal nexus between them and the statement at issue. Should the court consider this fact critical to the determination of the appeal, the Government requests that the case be remanded for a factual finding on the issue of whether such remarks were made and their impact on Rivera at the time of the statements at issue herein.

* The strip search conducted at the DEA office, about which Rivera complains here, was a reasonable effort to determine whether Rivera had contraband on his person and in no way violated his rights. *United States* v. *Klein*, 522 F.2d 296 (1st Cir. 1975), cited with approval in *United States* v. *Duvall*, Dkt. No. 75-1225 (2d Cir. Feb. 26, 1976), slip op. 2123, 2136.

custody. That Rivera may have finally been lodged in a cell at West Street lacking a regular bed was no doubt attributable to the overcrowding which had led officials at West Street to refer the agents and arrestees to the Tombs earlier in the night.

Finally, Rivera argues that he would not have made the statement at issue, characterized as "the only evidence . . . against him," if questioned on a later occasion. This contention overlooks the other compelling evidence of Rivera's guilt, including not only his participation in the transaction which led to his arrest but also a post-arrest statement by Glenn implicating Rivera in the offense. In addition, Meyerson and Fisher had made statements, not implicating Rivera but fully admitting their own guilt, *before* Rivera was interviewed. In view of all the circumstances, Rivera's statement was made of his own volition and was not obtained by exploitation of an allegedly illegal arrest.

CONCLUSION

The order of the District Court should be reversed.

Respectfully submitted,

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